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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, A CORPORATION, AND UNITED STATES FIDELITY & GUARANTY COMPANY, A CORPORATION,

Appellants,

vs.

R. O. JENKINS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ARKANSAS.

MOTION TO DISMISS OR AFFIRM AND STATEMENT OPPOSING JURISDICTION.

L. B. SMEAD,
J. V. SPENCER,
ROBERT C. KNOX,
Counsel for Appellee.

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STATUTES CITED.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellants,

vs.

R. O. JENKINS,
Appellee.

MOTION TO DISMISS OR AFFIRM.

Comes R. O. Jenkins, appellee, by L. B. Smead, J. V. Spencer and Robert C. Knox, his counsel, and moves this Court to dismiss the appeal in this cause for want of jurisdiction; and because the record fails to show that appellant is within the class with respect to whom it is alleged the statute under examination is unconstitutional; and because the record does not properly present a substantial Federal question; and because the appeal is informal, irregular and insufficient for reasons stated in the annexed argument and statement denying jurisdiction and upon other grounds: and appellee also moves this Court to affirm the judgment of the Arkansas Supreme Court herein upon the grounds that it is manifest that the appeal herein was taken for

delay only, and that the question upon which it is claimed that the jurisdiction depends are so frivolous as not to need further argument.

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Service acknowledged this 6th day of July, 1935.

NEILL C. MARSH,
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 386

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellants,

vs.

R. O. JENKINS,
Appellee.

STATEMENT MAKING AGAINST JURISDICTION AND ARGUMENT IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

A.

Record Fails to Show Appellant of Class Entitled to Raise Question.

The question of whether or not the statute under examination violates the provisions of the Fourteenth Amendment to the Constitution of the United States has once before been before this Court. (1)

There, this Court held that a corporation operating a railroad could not challenge the validity of the act, it not being in the class which could raise the question as to dis-

crimination between individuals and corporations generally.

The selection by the Act, of companies operating coal mines as a class upon which to impose responsibility for negligence of certain employees causing injury to other employees, does not, as to such companies, render the Act repugnant to the Constitution as denying equal protection of the laws. (2)

There is no competent evidence in the record as to whether appellant does or does not operate a railroad or a coal mine. The constitutionality of this statute was not brought in question during the trial of this cause, but was raised for the first time in the Motion for New Trial, filed more than sixty days after the verdict and judgment. Appellant offered no proof at the trial to establish the fact that it did not operate a railroad or a coal mine. It is true that the following statement appears as a part of paragraph Ninth of Appellant's Motion for New Trial: "• • • it is not alleged, nor was any proof offered to show, that this defendant, Phillips Petroleum Company, was operating any railroad, nor that it was engaged in the mining of coal, and in fact it was not engaged in operating any railroad or any coal mine." This unverified, *ex-parte*, statement of appellant's counsel set out in the Motion for New Trial that appellant "was not engaged in operating any railroad or any coal mine" is no proof of that fact, and under the settled practice in Arkansas, the insertion of such statement in the Motion for New Trial did not make it a part of the record, nor present it for the consideration of the Court. (3)

"It has been repeatedly held that one who would strike down a state statute as violative of the Federal Constitution must show that he is within the class of persons with respect to whom the Act is unconstitutional, and that the alleged unconstitutional feature injures him. (4)

Since there is no proof in the record that appellant *does not* operate a railroad or a coal mine, it has failed to show that it is within the class of corporations entitled to raise the question of discrimination, and its appeal for that reason should be dismissed.

The fact that appellee at the time of his injury was not employed in the operation of a railroad or the mining of coal, is not material, since the test is whether or not appellant operates a railroad or a coal mine, the statute making such companies liable to employees of all classes and in all departments without respect to hazard, and this fact does not render the act invalid. (5)

B.

Record Does Not Properly Present a Substantial Federal Question.

The record does not properly present a substantial Federal question. As before stated, the constitutional question was not raised during the trial of this cause. The record therefore is silent as to local conditions in Arkansas bearing on the question of whether there may be differences between the business generally carried on by corporations, and individuals, which would justify the application of different rules of law. It is not shown whether in 1907, when the challenged statute was enacted, or since, differences in the legislative schemes of the state affecting the two classes, or differences in business practices of corporations and individuals within the state do not furnish reason for different rules. The Court is asked to say *a priori* that there can be no reasonable basis for the legislative judgment.

The burden of establishing the unconstitutionality of the statute rested on appellant, and it will not be held invalid unless facts made known or generally assumed are such

as to preclude the assumption that the classification rests upon some rational basis. (6)

A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. (7)

There is no showing that the situation of corporations employing servants in Arkansas is so similar to that of individuals and partnerships employing servants, as to preclude any rational distinction between them, with respect to liability for the negligent act of one servant causing injury to another.

The legislature may have believed that an individual master who would of necessity come in personal contact with his men and their families would feel sufficient moral responsibility for their safety to insure that he would employ only careful and prudent men to work with them, while in the case of a corporation, acting only through agents, with the management often far removed from the scene of operations, no such personal and moral responsibility would exist, and the safety of men could be better insured by making the corporataion responsible for the negligent acts of the men whom it employed.

Likewise, the legislature may have found that generally in Arkansas, corporations were engaged in that type of business which carried with it increased hazard to their employees, such as manufacturing, mining, operating railroads, street cars, electrical systems, gas lines, etc., while as a general rule the individual employer was engaged in business where his employee was relatively safe, such as agriculture, the trades, etc.

If the legislature found such differences, it could in its judgment make a choice of method to guard against the evil. (8)

It could likewise decide whether the differences are general enough as respect corporations, to call upon it to say whether the provisions of the act should be applied to them

as a class rather than to members of it selected by more empirical methods. (9)

C.

Question One of Local Law.

The Arkansas Supreme Court holds this statute valid as an Amendment to the charters of corporations made under the right reserved in the Constitution of the State to repeal, alter, or amend such charters. (10) The decision is therefore one of local law. The fact that appellant is a foreign corporation does not change the rule since the Constitution of Arkansas specifically provides that foreign corporations admitted to the State "shall be subject to the same regulations, limitations and liabilities as like corporations of this State." (11) And it has been repeatedly held that that which a State may do with corporations of its own creation, it may do with foreign corporations admitted therein. (12)

To sustain his allegations making against jurisdiction, and in support of his Motion to Dismiss or Affirm, appellee respectfully calls attention to the following cases:

A. Record Fails to Show Appellant of Class Entitled to Raise Question.

(1) *Aluminum Co.* v. *Ramsey,* 251 U. S. 256.

(2) *Wilmington Star Min. Co.* v. *Fulton,* 205 U. S. 260.

(3) *Cox* v. *Cooley,* 88 Ark. 350; *Foohs* v. *Bilby,* 95 Ark. 302; *Cravens* v. *State,* 95 Ark. 321; *Wolfe* v. *State,* 107 Ark. 29.

(4) Mr. Justice Brandeis in *Heald* v. *District of Columbia,* 259 U. S. 114, citing: *Albany County* v. *Stanley,* 105 U. S. 305, 311; *New York ex rel. Hatch* v. *Reardon,* 204 U. S. 152, 160; *Citizens Nat. Bank* v. *Kentucky,* 217 U. S. 443, 453; *Plymouth Coal Co.* v. *Pennsyl-*

vania, 232 U. S. 531, 544; *Thomas Cusack Co.* v. *Chicago*, 242 U. S. 526, 530; *Arkadelphia Co.* v. *St. Louis Southwestern R. Co.*, 249 U. S. 134, 149.

(5) *Louisville & Nashville R. R. Co.* v. *Melton*, 218 U. S. 36; *Manduo* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1; *Mo. Pac. R. Co.* v. *Mackey*, 123 U. S. 205; *Mobile J. & K. C. R. Co.* v. *Turnipseed*, 219 U. S. 35.

B. Record Does Not Properly Present a Substantial Federal Question.

(6) *Metropolitan Casualty Inc. Co.* v. *Brownell*, decided March 18, 1935, 79 L. E. 564; *Erb* v. *Morasch*, 177 U. S. 584, 586; *Stebbins* v. *Riley*, 268 U. S. 137, 143; *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, 158; *Swiss Oil Corp.* v. *Shanks*, 273 U. S. 407, 413, 414; *Ft. Smith Light & Traction Co.* v. *Board of Improvement*, 274 U. S. 387, 391, 392; *Ohio ex rel. Clarke* v. *Deckebach*, 274 U. S. 392; *Silver* v. *Silver*, 280 U. S. 117, 123; *O'Gorman & Young* v. *Hartford F. Ins. Co.*, 282 U. S. 251, 257, 258.

(7) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Rast* v. *Van Deman & L. Co.*, 240 U. S. 342, 357; *State Tax Comrs.* v. *Jackson*, 283 U. S. 527, 537.

(8) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Standard Oil Co.* v. *Marysville*, 279 U. S. 582, 584; *Hardware Dealers Mut. F. Ins. Co.* v. *Glidden Co.*, 284 U. S. 151, 158.

(9) *Metropolitan Casualty Ins. Co.* v. *Brownell, supra*; *Ohio ex rel. Clarke* v. *Deckebach, supra* (274 U. S. 397); *Westfall* v. *United States*, 274 U. S. 256, 259; *Silver* v. *Silver*, 280 U. S. 117, 123.

C. Question One of Local Law.

(10) Art. 12, Sec. 6, Constitution of Arkansas, *Ozan Lumber Co.* v. *Biddle*, 87 Ark. 587.

(11) Art. 12, Sec. 11, Constitution of Arkansas.

(12) *Orient Ins. Co.* v. *Daggs*, 172 U. S. 557; *New York Life Ins. Co.* v. *Cravens*, 178 U. S. 389; *Prudential Ins. Co.* v. *Cheek*, 259 U. S. 530; *Dayton Coal & Iron Co.* v. *Barton*, 183 U. S. 23.

It is therefore respectfully submitted that this Court is without jurisdiction of this cause, and that this appeal should be dismissed; or that appellee's alternative Motion to Affirm should be granted.

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(6822-C)